

IN

JUL 16 2004

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

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In re ENRON CORPORATION SECURITIES  
LITIGATION

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§ MDL Docket No. 1446

This Document Relates To:

MARK NEWBY, et al., Individually and On  
Behalf of All Others Similarly Situated,

§ Civil Action No. H-01-3624  
§ **(Consolidated)**

Plaintiffs,

§ CLASS ACTION

vs.

ENRON CORP., et al.,

Defendants.

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THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al., Individually and On Behalf  
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

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[Caption continued on next page]

**BANK DEFENDANTS' MOTION TO CLARIFY THE MARCH 11, 2004 SCHEDULING  
ORDER, WITH RESPECT TO THIRD-PARTY COMPLAINTS AND CROSS CLAIMS  
IN ACTIONS NOT PROCEEDING UNDER THE CONSOLIDATED NEWBY AND  
TITTLE COMPLAINTS**

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PAMELA M. TITTLE, *et al.*,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

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OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS OF ENRON CORP.,

Plaintiffs,

vs.

ANDREW S. FASTOW, MICHAEL J. KOPPER,  
BEN GLISAN, JR., RICHARD B. BUY,  
RICHARD A. CAUSEY, JEFFREY K.  
SKILLING, KENNETH L. LAY, JEFFREY  
McMAHON, JAMES V. DERRICK, JR.,  
KRISTINA M. MORDAUNT, KATHY LYNN,  
ANNE YAEGER-PATEL, ARTHUR  
ANDERSEN, LLP, AND CARL FASTOW, AS  
ADMINISTRATOR OF THE FASTOW FAMILY  
FOUNDATION,

Defendants.

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Civil Action No. H-01-3913

Civil Action No. H-04-0091

[Caption continued on next page]

ELAINE L. CHAO, SECRETARY OF THE  
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

**VS.**

ENRON CORP., et al.,

**Defendants.**

§ § § § § § § § § § § §

Civil Action No. H-03-2257  
(Consolidated with H-01-3913)

**BANK DEFENDANTS' MOTION TO CLARIFY THE MARCH 11, 2004 SCHEDULING ORDER, WITH RESPECT TO THIRD-PARTY COMPLAINTS AND CROSS CLAIMS IN ACTIONS NOT PROCEEDING UNDER THE CONSOLIDATED *NEWBY* AND *TITTLE* COMPLAINTS**

The undersigned defendants (collectively the “Bank Defendants”)<sup>1</sup> respectfully submit this Motion To Clarify The March 11, 2004 Scheduling Order, With Respect To Third-Party Complaints And Cross Claims In Actions Not Proceeding Under The Consolidated *Newby* And *Tittle* Complaints (“Motion”). The Motion seeks clarification as to the applicable date by which defendants must file third-party complaints and cross-claims in actions that are *not* proceeding under the consolidated *Newby* and *Tittle* complaints.<sup>2</sup> The relief requested through this Motion does not in any way affect the schedule for the *Newby* and *Tittle* actions, nor does it

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<sup>1</sup> This motion is made on behalf of defendants Citigroup Inc., Citibank, N.A., Citigroup Global Markets Inc. (formerly Salomon Smith Barney Inc.) and Citigroup Global Markets Ltd. (formerly known as Salomon Brothers International Limited), J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, J.P. Morgan Securities, Inc., Bank of America Corp., Banc of America Securities LLC, Bank of America, N.A., Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Credit Suisse First Boston LLC, Credit Suisse First Boston (USA), Inc., Pershing LLC, Merrill, Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC Inc., Toronto Dominion Bank, Toronto Dominion Holdings (USA), Inc., TD Securities, Inc., TD Securities (USA) Inc., Toronto Dominion (Texas) Inc., Royal Bank of Canada, RBC Dominion Securities Inc., RBC Dominion Securities Ltd., RBC Holdings (USA) Inc., RBC Dominion Securities Corp., Royal Bank Holding Inc., Royal Bank DS Holding, Inc., Royal Bank of Canada Europe Ltd., Deutsche Bank AG, Deutsche Bank Securities Inc., DB Alex. Brown LLC, Deutsche Bank Trust Company Americas, Lehman Brothers Holdings Inc., Lehman Brothers Inc., Lehman Brothers Commercial Paper Inc., The Royal Bank Of Scotland Group plc, The Royal Bank of Scotland plc, National Westminster Bank Plc, Greenwich Natwest Structured Finance, Inc., and Greenwich Natwest Ltd., Campsie Ltd. Certain of the bank defendants who join in this motion—namely, Royal Bank of Scotland, Royal Bank of Canada, and Toronto Dominion Bank, and their respective affiliates—are covered by the stay of discovery under the Private Securities Litigation Reform Act (15 U.S.C. Sec. 78u-4(b)(3)(B)), and join here without waiving any rights with respect to that stay.

<sup>2</sup> Except to the limited extent requested by three of the Bank Defendants named in *The Regents of the Univ. of California v. Toronto Dominion Bank, et al*, Civil Action No. H-03-5528, S.D.Tex, and *The Regents of the Univ. of California v. Royal Bank of Canada, et al*, Civil Action No. H-04-0087, S.D.Tex, as set forth in footnote 5 below.

in any way affect the continuation or scheduling of fact discovery in any of the Enron actions currently proceeding before this Court.

On July 11, 2003, the Court signed a Scheduling Order governing all Enron related actions proceeding before this Court. (“July 11, 2003 Order”) (Docket No. 1561). Part I of the July 11, 2003 Order sets forth a logical regime for the management of consolidated, related and coordinated cases that are *not* currently proceeding under the *Newby* and *Tittle* consolidated complaints (the “private actions”). Specifically, Part I of the Order provides that such private actions are “stayed as to the filing of amended pleadings and/or responsive pleadings until the motions for class certification in *Newby* and *Tittle* are resolved by the Court, but discovery may proceed.” July 11, 2003 Order at ¶ I.B. Part I of the Order further provides that, within two weeks of resolution of class certification motions by the Court, plaintiffs in such private actions must elect whether to proceed under the *Newby* and *Tittle* complaints or proceed with their own private actions, and, if they elect to go it alone, the Order sets a schedule for the filing of any amended and responsive pleadings. July 11, 2003 Order at ¶ I.C. Furthermore, Part I of the July 11, 2003 Order provides that “*discovery* shall proceed”<sup>3</sup> in the private actions in accordance with the same schedule as for *Newby* and *Tittle*, and Part II of the Order sets forth in detail that discovery schedule. July 11, 2003 Order at ¶ I.F. Significantly, the July 11, 2003 Order only fixes a deadline for adding third-parties and making cross-claims in the *Newby* and *Tittle* cases, but does not appear to fix any such deadline with respect to the private actions. This makes sense in light of the fact that such private actions remain stayed except for discovery purposes in accordance with Part I of the July 11, 2003 Order, and the fact that the private action plaintiffs may, after resolution of class certification issues, seek to amend their complaints

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<sup>3</sup> Emphasis added.

(and/or seek to add new defendants against which existing defendants may currently contemplate asserting claims). July 11, 2003 Order at II.C.3.

On March 11, 2004, this Court signed a further Scheduling Order, replacing Part II of the July 11, 2003 Order with a revised discovery schedule that had been agreed among the parties. (“March 11, 2004 Order”) (Docket No. 2019). The March 11, 2004 Order states that “the Pretrial-Scheduling Order, which shall apply to the *Tittle* and *Newby* actions and those consolidated and coordinated cases *for discovery purposes*, shall be as follows ...”<sup>4</sup> The Order then sets forth the revised schedule, and includes a provision stating that the “deadline to join new parties or to file a third-party complaint or cross complaint/claims” is Monday, August 2, 2004. However, the final sentence of the March 11, 2004 Order further provides that “as to consolidated, related and coordinated cases not currently proceeding under the controlling *Newby* and *Tittle* consolidated complaints, the Court’s ruling in Part I of the July 11, 2003 Scheduling Order will govern the schedule for those cases.” March 11, 2004 Order at 2. Accordingly, the regime for determining which of the private actions will go forward, and staying the filing of amended and responsive pleadings in such private actions pending resolution of class certification issues, was endorsed and continued by the terms of the March 11, 2004 Order.

There is no doubt that the *discovery* deadlines in the March 11, 2004 Order—fact depositions, expert reports and depositions, and so on—apply equally to the private actions and the *Newby* and *Tittle* actions, and the relief sought in this Motion in no way affects that discovery schedule. However, while the March 11, 2004 Order is clear that the private actions remain subject to the stay on further pleadings, there is potential to read the March 11, 2004 Order to suggest that defendants in such private actions are nonetheless required to file any third-party

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<sup>4</sup> Emphasis added.

complaints and cross-claims by August 2, 2004. Needless to say, it would be a procedurally illogical situation if defendants in the private actions were required to file cross-claims and implead third-party defendants before even having responded to the complaints in such actions, as is the case with most of the private actions.<sup>5</sup> Moreover, consistent with Part I of the July 11, 2003 Order, it makes perfect sense to defer all further pleadings, including third-party complaints and cross-claims, until after class-certification is decided, given the likelihood that some unknown number of the private action plaintiffs may at that time elect to proceed under the consolidated *Newby* and *Tittle* complaints.

While the background to the March 11, 2004 Order, and the wording of the Order itself, strongly suggest that third-party complaints and cross-claims in the private actions are similarly deferred until after Lead Plaintiff's amended motion for class certification is resolved, there is room for some doubt as to exactly how the two Scheduling Orders are to be read together. Accordingly, with the August 2, 2004 date approaching, the Bank Defendants respectfully request that the Court's March 11, 2004 Order be clarified to confirm that any filing of third-party complaints and cross-claims is stayed in those private actions which remain governed by the stay on further pleadings in Part I of the July 11, 2003 Order. The Bank Defendants also suggest, consistent with a scheduling adjustment that has been agreed among the parties to the Enron Adversary Proceeding pending before Judge Gonzalez (*Enron Corp, et al. v. Citigroup Inc., et al.*, Adversary Proceeding No. 03-09266 (AJG) S.D.N.Y. Bkr.), subject to

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<sup>5</sup> The same rationale also applies with respect to three of the Bank Defendants in *Newby*—Royal Bank of Scotland, Royal Bank of Canada, Toronto Dominion Bank, and their respective affiliates—who have not yet been required to file an Answer in *Newby*. By this motion, consistent with Rules 13 and 14 of the Federal Rules of Civil Procedure, they also seek to confirm explicitly that they do not have to file cross-claims or third-party complaints before filing an Answer. The Proposed Order would address this anomaly as well.

Judge Gonzalez' approval, that the defendants in such private actions be permitted to file third-party complaints and cross-claims within thirty (30) days of answering the complaints in such actions.<sup>6</sup> The Bank Defendants respectfully request that the Court enter the Proposed Order submitted with this Motion.

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<sup>6</sup> In the Enron Adversary Proceeding the parties have agreed, subject to Judge Gonzalez' approval, that defendants who answer the Adversary Proceeding complaint after April 1, 2004 may file third-party complaints by the later of November 1, 2004 *or 30 days after filing their Answer*.



Dated: July 16, 2004

Respectfully submitted,

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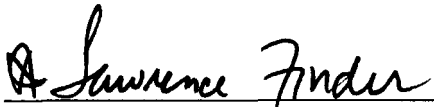
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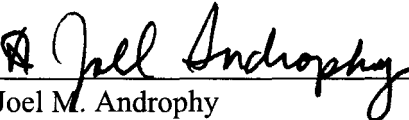
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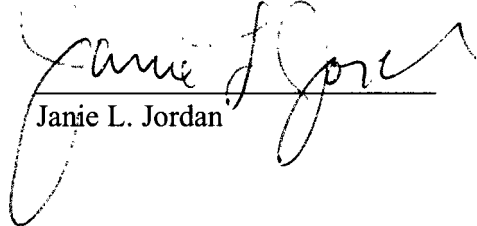
LEHMAN BROTHERS INC., LEHMAN

BROTHERS COMMERCIAL

PAPER INC.

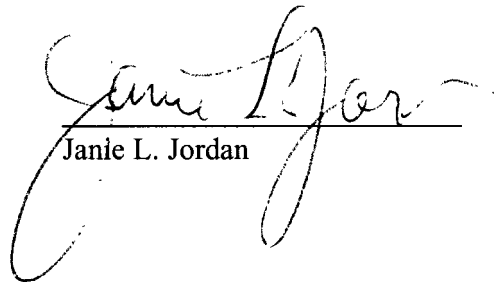
**CERTIFICATE OF CONFERENCE**

Counsel for the Bank Defendants have conferred with counsel for certain of the plaintiffs in actions not proceeding under the *Newby* and *Tittle* consolidated complaints, and have been unable to reach consensual resolution of the issue raised in this Motion.

  
Janie L. Jordan

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing has been served upon all known counsel of record by electronic mail to the esl3624.com website on this 16th day of July, 2004.

  
Janie L. Jordan

In re ENRON CORPORATION SECURITIES  
LITIGATION

**This Document Relates To:**

MARK NEWBY, et al., Individually and On  
Behalf of All Others Similarly Situated,

Plaintiffs,

**VS.**

ENRON CORP., et al.,

**Defendants.**

THE REGENTS OF THE UNIVERSITY OF  
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of All Others Similarly Situated,

Plaintiffs,

**VS.**

KENNETH L. LAY, et al.,

**Defendants.**

[Caption continued on next page]

PAMELA M. TITTLE, *et al.*,

Plaintiffs,

**VS.**

ENRON CORP., et al.,

Defendants.

Civil Action No. H-01-3913

OFFICIAL COMMITTEE OF UNSECURED  
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KRISTINA M. MORDAUNT, KATHY LYNN,  
ANNE YAEGER-PATEL, ARTHUR  
ANDERSEN, LLP, AND CARL FASTOW, AS  
ADMINISTRATOR OF THE FASTOW FAMILY  
FOUNDATION,

Defendants.

Civil Action No. H-04-0091

[Caption continued on next page]

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ELAINE L. CHAO, SECRETARY OF THE  
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

vs.

ENRON CORP., et al.,

Defendants.

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Civil Action No. H-03-2257  
(Consolidated with H-01-3913)



**[PROPOSED] ORDER CLARIFYING THE MARCH 11, 2004 SCHEDULING ORDER  
WITH RESPECT TO THIRD-PARTY COMPLAINTS AND CROSS CLAIMS IN  
ACTIONS NOT PROCEEDING UNDER THE CONSOLIDATED *NEWBY* AND *TITTLE*  
COMPLAINTS**

Upon the Bank Defendants' Motion To Clarify The March 11, 2004 Scheduling Order, With Respect To Third-Party Complaints And Cross Claims In Actions Not Proceeding Under The Consolidated *Newby* And *Tittle* Complaints ("Motion"), it is hereby:

**ORDERED** that the Motion is **GRANTED**; and it is

**FURTHER ORDERED** that this Court's March 11, 2004 Scheduling Order is clarified as follows:

Deadline to join new parties or to file a third-party  
complaint or cross-complaint/claims

In each action, the later of Monday,  
August 2, 2004 or 30 days after the  
party files its Answer

SIGNED at Houston, Texas, this \_\_\_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
MELINDA HARMON  
UNITED STATES DISTRICT JUDGE